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No. 89-1405

In the Supreme Court of the United States

OCTOBER TERM, 1989

EDWARD TEMENGIL, ET AL., PETITIONERS

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 502(a)(2) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands, 90 Stat. 268 (1976), 48 U.S.C. 1681 note, renders the government of the Trust Territory of the Pacific Islands subject to suit for money damages in district court under 42 U.S.C. 1981 and 1983.

2. Whether the Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189 (1947), or the Trust Territory Code authorizes private suit for money damages against the Trust Territory government.



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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-23) is reported at 881 F.2d 647. The opinion of the district court (Pet. App. 26-150) is reported at 33 Fair Empl. Prac. Cas. (BNA) 1027.¹

¹ The judgment of the district court, which is unreported, was filed on December 1, 1987, after calculation of damages and after opinions concerning class certification (May 29, 1984), immunity, punitive damages and jury trial (Feb. 4, 1985), federal sovereign immunity (Aug. 12, 1985), cross-motions for summary judgment (June 6, 1986), and attorneys' fees (Nov. 13, 1987), all of which are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1989. A petition for rehearing was denied on January 2, 1990. Pet. App. 1-2. The petition for certiorari was filed on March 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Trust Territory of the Pacific Islands consists of a group of Western Pacific islands formerly known as Micronesia. Between World War I and World War II the islands were governed by Japan under a mandate from the League of Nations. After the Japanese defeat in World War II, the United States assumed responsibility, as trustee, for governing the islands under an agreement with the United Nations Security Council. See Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, United States-United Nations, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189.

Among other things, the Trusteeship Agreement granted the United States "full powers of administration, legislation, and jurisdiction over the territory," art. 3, 61 Stat. 3302, subject to the United States' obligation to "promote the development of the inhabitants * * * toward self-government or independence, as may be appropriate to the particular circumstances of the trust territory and its peoples." Art. 6(1), 61 Stat. 3302. As the "administering authority," the United States was authorized to "apply to the trust territory, subject to any modifications which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements." Art. 3, 61 Stat. 3302.

Pursuant to 48 U.S.C. 1681(a), the President delegated authority over the Trust Territory to the Secretary of the Interior. Exec. Order No. 11,021, 3 C.F.R. 600 (1959-1963 Comp.). The Secretary in turn established a three-branch local government for the Trust Territory, located on the Northern Marianas island of Saipan, with executive power vested in a High Commissioner of the Trust Territory, judicial authority vested in a High Court for the Trust Territory, and legislative authority vested in a popularly-elected Congress of Micronesia. See Secretarial Order No. 2918, 34 Fed. Reg. 157 (1968).

Ultimately, the Trust Territory was divided into four geographically distinct regions: (1) the Northern Mariana Islands, (2) the Marshall Islands, (3) the Federated States of Micronesia, and (4) Palau. In recent years, each of these regions has progressed towards the self-government contemplated by the Trusteeship Agreement.

In March 1976, Congress and the President approved a covenant constituting the Northern Mariana Islands as a commonwealth under the sovereignty of the United States. See Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, Feb. 15, 1975, United States-Northern Mariana Islands, 90 Stat. 263, 48 U.S.C. 1681 note (the Covenant). Accordingly, a constitution for the Northern Marianas was enacted, and as of January 9, 1978, governmental control over the area passed by order of the Secretary of the Interior from the Trust Territory government to the newly created commonwealth government.² See Secretarial Order No. 2989, 41 Fed. Reg. 15,892

² The High Court of the Trust Territory retained some residual authority. Pet. App. 9 n.2.

(1976); Proclamation No. 4534, 3 C.F.R. 56 (1977 Comp.). The Trust Territory government, however, continued to be located on Saipan in the Northern Marianas.

The three remaining regions each formed its own government and negotiated a compact with the United States. By 1979, most of the remaining functions of the Trust Territory government were delegated to the separate governing bodies of the Marshall Islands, Palau, and the Federated States of Micronesia. See Secretarial Order No. 3039, 44 Fed. Reg. 28,116, 28,117 (1979); Pet. App. 48-49. The Trust Territory government retained only certain administrative, accounting, and budgeting functions relating to federal financial assistance to those three local governments. Pet. App. 48-49.

The dissolution of the Trust Territory government was largely completed with the approval of Compacts of Free Association between the United States and the now-independent Federated States of Micronesia and Republic of the Marshall Islands. Cf. *United States v. Covington*, 783 F.2d 1052, 1054-1055 (9th Cir. 1985) (treating Marshall Islands as "a foreign country"), cert. denied, 479 U.S. 831 (1986). As a result, the Trusteeship Agreement has been declared to be "no longer in effect" for all of the former Trust territories except Palau. See Presidential Proclamation No. 5564, 3 C.F.R. 146 (1986 Comp.). Although no final agreement has been reached concerning the future status of the Republic of Palau, it has been exercising substantial powers of self-government and the court of appeals found that it "operates as an independent nation." Pet. App. 11. See also Secretarial Order No. 3119, § 2, 52 Fed. Reg. 27,859 (1987).

By the time of the Ninth Circuit's decision, the Trust Territory government employed only four per-

sons. Pet. App. 11 n.5. The Office of the High Commissioner had been abolished, and the authority of the Secretary of the Interior over what was left of the Trust Territory had been delegated to the Assistant Secretary—Territorial and International Affairs, who was authorized to “assume and exercise the authority of the Office of the High Commissioner.” Secretarial Order No. 3119, § 3, 52 Fed. Reg. 27,859 (1987). The High Court of the Trust Territory remained in existence to review decisions of the highest court of Palau and to enforce the Occupational Safety and Health Act in Palau. *Id.* § 6, 52 Fed. Reg. 27,860 (1987) (as amended Jan. 14, 1988).

2. This suit arises out of petitioners’ challenge to the salary plan for Trust Territory government employees, most of whom were stationed at the Trust Territory government’s headquarters on Saipan in the Northern Mariana Islands. The plan, which is no longer in use (Pet. App. 11 n.5), included a long-standing three-level compensation scheme, by which the salary of government employees was governed by their nationality. Citizens of Asian and Micronesian countries received less pay than citizens of the United States or of countries in Europe. Pet. App. 11, 32-33. Petitioners claimed that this salary plan was discriminatory.

Petitioners brought suit under, *inter alia*, 42 U.S.C. 1981 and 1983, as made applicable in the Northern Marianas by Section 502(a)(2) of the Covenant. Petitioners also brought claims based on the Trusteeship Agreement and the Trust Territory Code.³ Named as defendants were the Trust Territory gov-

³ Petitioners also claimed that the employment plan violated Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, 2000e *et seq.*

ernment and the High Commissioner of the Territory.⁴ Petitioners sought injunctive relief against the employment scheme and damages from January 9, 1978, the date on which Section 502(a)(2) and most other provisions of the Covenant took effect.

a. The district court ruled that the Trust Territory government and the High Commissioner (in his official capacity, see Pet. App. 33 n.5) were liable to suit for monetary damages pursuant to 42 U.S.C. 1981 and 1983.⁵ The court noted that under Section 502(a)(2) of the Covenant, "[t]hose laws . . . which are applicable to Guam and which are of general application to the several States as they are applicable to the several States" will apply to the Northern Marianas. Pet. App. 97. Because there was no dispute that 42 U.S.C. 1981 and 1983 were applicable to Guam and to the several States, the court concluded that the two statutes are generally applicable to the Northern Marianas. *Ibid.*

The court then addressed the specific question whether the Trust Territory government, located in the Northern Marianas but no longer exercising governmental authority over it, was subject to Sections 1981 and 1983. Pet. App. 97-118. The court concluded that applying the two statutes to the Trust Territory government was in accord with the purposes underlying the Covenant. Pet. App. 111-118.⁶

⁴ Also named as defendants were the Department of the Interior, the Secretary of the Interior, and the United States. Pet. App. 33.

⁵ The district court also granted a permanent injunction against future maintenance of the salary plan. Pet. App. 11 n.5.

⁶ With respect to Section 1983, the court also concluded (1) that Section 1983 provided a cause of action against the Trust

b. The district court also ruled that petitioners could maintain their claims under the Trusteeship Agreement and the Trust Territory Code. With respect to the Trusteeship Agreement, the court held that the Agreement imposed enforceable obligations on "federal agencies" and ruled that the Trust Territory government and the High Commissioner had that status. Pet. App. 67-79. Furthermore, and notwithstanding its holding that the Trust Territory government and High Commissioner were "federal agencies," the court held that the sovereign immunity of the United States would not bar suits for monetary damages for violations of the Trusteeship Agreement against the Trust Territory government and the High Commissioner. Pet. App. 79-84. Finally, the court reached a similar conclusion with respect to the civil rights provisions of the Trust Territory Code. Pet. App. 148-149.

3. On July 28, 1989, the court of appeals reversed the district court's award of monetary damages.⁷ Pet. App. 3-25. The court relied primarily on previous decisions concluding that the Trust Territory government enjoyed a unique status as a "quasi-sovereign." Pet. App. 13. Unlike other territories over which the United States exercises plenary control, the Trust

Territory government for violations of the Due Process and Equal Protection Clauses of the United States Constitution (Pet. App. 123-131); (2) the salary plan at issue was established under color of territorial law (Pet. App. 131-138); and (3) the Trust Territory government was a suable "person" under Section 1983 (Pet. App. 138-139).

⁷ The plan is no longer in use, and respondents did not contest the injunction on appeal.

Territory was administered by the United States as Trustee, with the right of self-government ultimately remaining in the people of the Trust Territory. *Ibid.* In light of this unique status, prior decisions had held that U.S. laws do not apply to the Trust Territory government "unless they are specifically made applicable by Congress." Pet. App. 12. In this case, the court concluded that, despite the "historical accident" by which the Trust Territory government was located in the Northern Marianas (*ibid.*), "Congress did not intend section 502 of the Covenant to govern the working of the Trust Territory government." Pet. App. 14. The Court therefore held that 42 U.S.C. 1981 and 1983 "do not apply to the Trust Territory government." Pet. App. 14.⁸

The court also concluded that the Trusteeship Agreement did not provide a basis for monetary relief, finding "no external indication that Congress or the Executive intended the Trusteeship Agreement to create a right to monetary damages," nor "anything in the language of the Trusteeship Agreement [to] indicate [such] an intent." Pet. App. 16-17 (footnote omitted). Similarly, the court found "no indication that the Secretary of the Interior (or Congress through the Secretary) intended the Trust Territory Code to give rise to monetary damages." Pet. App. 17.⁹

⁸ Judge Kozinski, concurring as to this portion of the court's opinion, would have found jurisdiction lacking over petitioners' Section 1981 and 1983 claims on the ground that those claims were "in essence suits against the United States," as to which there was no applicable waiver of sovereign immunity. Pet. App. 25.

⁹ In other portions of its opinion, the court of appeals held that petitioners' claims against the Trust Territory under

ARGUMENT

The decision of the court of appeals is of extremely limited effect, since it concerns the availability of money damages against a unique governmental entity that has virtually ceased to exist. In any event, the decision is correct and does not conflict with the decisions of this Court or of any other court. The case therefore does not warrant further review.¹⁰

1. As the court of appeals aptly observed, the functions of the Trust Territory government are now "vestigial." Pet. App. 11 n.5. The Republic of the Marshall Islands and the Federated States of Mi-

Title VI of the Civil Rights Act of 1964 were precluded because providing employment was not the primary objective of federal financial assistance to the Trust Territory government (Pet. App. 18), and that petitioners' claims against the Trust Territory under Title VII of the same act were barred because of petitioners' "complete failure" to file complaints with the EEOC. Pet. App. 19. The court also dismissed petitioners' claims against the federal defendants based on 1 Trust Territory Code § 7 (Michie 1980) (Pet. App. 19-20), found that petitioners' Trusteeship Agreement claims against the federal defendants were barred by sovereign immunity (Pet. App. 21), and upheld the district court's refusal to approve the addition of nine Social Security workers to the petitioners' proposed class. Pet. App. 21-22.

¹⁰ Petitioners do not appear to contest the court's determination that damages may not be recovered against the United States, the Department of the Interior, and the Secretary of the Interior (the "federal respondents"). Pet. i (presenting questions of recovery against the Trust Territory government alone). Nonetheless, the federal respondents retain an interest in the issues raised by the petition, since the Trust Territory government is funded through federal appropriations (Pet. App. 23-24) and any recovery by petitioners would ultimately have to be obtained from the United States.

cronesia have become independent nations, and the Commonwealth of the Northern Mariana Islands has become a part of the United States under the Covenant. Pet. App. 10. Although the Trusteeship Agreement remains in effect for Palau, the Trust Territory government's responsibilities have for the most part been delegated to the Assistant Secretary of the Interior for Territorial and International Affairs. Secretarial Order No. 3119, § 3, 52 Fed. Reg. 27,859 (1987). Therefore, the issues presented here, such as the applicability of U.S. law to the Trust Territory, the sovereign immunity enjoyed by the Trust Territory government, and the interpretation of the Trusteeship Agreement and the Trust Territory Code, have no continuing significance beyond the facts of this case.

2. This Court's recent decision in *Ngiraingas v. Sanchez*, 110 S. Ct. 1737 (1990), confirms the result reached by the court of appeals barring petitioners' claims under 42 U.S.C. 1983. In *Ngiraingas*, the Court held that Congress did not intend to subject territorial governments to suit for money damages when it acted in 1874 to extend 42 U.S.C. 1983 to cover territories, and that the Territory of Guam itself thus may not be sued for damages under Section 1983.

The only two factors distinguishing the Trust Territory from Guam or other territories—that as an “historical accident” (Pet. App. 12) the Trust Territory after 1979 had its seat of government outside the area it governs, and that it enjoyed a unique status as “quasi-sovereign” (Pet. App. 13)—do not cast any doubt on the application of *Ngiraingas* to this case. The location of the seat of government has nothing to do with Congress's intent as to whether a territory should be subject to suit under Section 1983,

and the unique relationship between the Trust Territory and the United States suggests, if anything, that its claim to immunity from money damages is stronger than that of other territories. Thus, the result in *Ngiraingas* establishes that the Trust Territory and its High Commissioner in his official capacity are not subject to suit under Section 1983.¹¹

3. The court of appeals' holding that the Trust Territory may not be sued under 42 U.S.C. 1981 for money damages is correct and does not conflict with any decision of this or any other court. As the court of appeals noted, the dispute in this case centered around the district court's apparent holding that, because of the "historical accident" (Pet. App. 12) by which the Trust Territory government was located in the territory of the Commonwealth, laws of general applicability within the Commonwealth (such as Section 1981) must be applied to the Trust Territory government as to any other private litigant there. The court of appeals' decision that the Trust Territory government is not subject to Section 1981 by virtue of Covenant Section 502(a)(2) is supported by two related arguments.

¹¹ Contrary to petitioners' assertion, the Ninth Circuit in this case did not "[m]odif[y]" (Pet. 16) its decision in *Fleming v. Department of Public Safety*, 837 F.2d 401, 404-405 (9th Cir.), cert. denied, 109 S. Ct. 222 (1988). *Fleming* involved a suit under 42 U.S. 1983 for damages against the police department of the Commonwealth of the Northern Mariana Islands, in which the Ninth Circuit held that Section 1983 applied to the Commonwealth by virtue of Covenant Section 502(a)(2). 837 F.2d at 404-405. The case did not involve claims against the Trust Territory government, nor did the Court in *Fleming* discuss the liability of the Trust Territory government under Section 1983 in any respect. In any event, the result in *Fleming* appears to have been overturned by this Court's holding in *Ngiraingas*.

a. Decisions of both the District of Columbia and Ninth Circuits—the only two circuits to address this issue—have established that, unlike an ordinary United States territory or commonwealth—see, *e.g.*, 48 U.S.C. 734 (Puerto Rico); 48 U.S.C. 1574(c) (Virgin Islands)—the Trust Territory is not generally subject to the laws of the United States. Because the United States “does not possess sovereignty over the Trust Territory,” *Fleming v. Department of Public Safety*, 837 F.2d 401, 404 n.1 (9th Cir.), cert. denied, 109 S. Ct. 222 (1988); accord, *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 684 (9th Cir.), cert. denied, 467 U.S. 1244 (1984); *McComish v. Commissioner*, 580 F.2d 1323, 1330 (9th Cir. 1978), the “unique trusteeship arrangement” under which the United States administers the Trust Territory “differs widely from any of the traditional relationships of governmental entities.” *Gale v. Andrus*, 643 F.2d 826, 830 (D.C. Cir. 1980). The courts of appeals have therefore agreed that “the laws of the United States do *not* automatically apply to the [Trust] Territory unless they are specifically made applicable by Congress.” *Ibid.* (emphasis in original); see also *People of Saipan v. United States Dep’t of Interior*, 502 F.2d 90, 96 n.6 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975); *People of Enewetak v. Laird*, 353 F. Supp. 811, 815 (D. Haw. 1973).¹²

¹² Indeed, the Trusteeship Agreement expressly provides that the United States, as the administering authority, “may apply to the trust territory, subject to any modifications which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.” Trusteeship Agreement, art. 3, 61 Stat. 3302. Petitioners themselves acknowledge that art. 3 “give[s] some slight support” to the contention that a

In light of the decisions of the courts of appeals holding United States law inapplicable to the Trust Territory absent specific congressional action, the viability of petitioners' Section 1981 claim depends on a showing of such congressional action. Yet petitioners cite no authority—aside from Covenant Section 502(a)(2)—suggesting that Congress intended to apply Section 1981 to the Trust Territory.¹³ Ordinarily, Congress manifests its intent to apply a particular federal statute to the Trust Territory by defining the term “State” or “United States” to which the statute applies to include the Trust Territory. See *People of Enewetak v. Laird*, 353 F. Supp. 811, 815 n.8 (D. Haw. 1973) (collecting examples). Not surprisingly, neither the language nor the legislative history of 42 U.S.C. 1981—a statute passed following the Civil War—suggests that the coverage of the statute was intended to include the Trust Territory, which was established under a unique arrangement with the U.N. Security Council following World War II.

federal law applies to the Trust Territory “only if specifically set forth in that law” (Pet. 19). As the District of Columbia Circuit has noted, to hold that the laws of the United States automatically apply “would place the United States by judicial decision in a governmental posture involving the Trust Territory that the United Nations never intended it to occupy.” *Gale*, 643 F.2d at 830.

¹³ The district court relied heavily on the fact that Congress had taken no action *excluding* the Trust Territory government from laws made generally applicable within the Northern Marianas by virtue of Covenant Section 502(a)(2). Pet. App. 113-114. The courts of appeals, however, have made it clear that Congress must act positively to subject the Trust Territory to federal law; merely to exclude the Trust Territory from the scope of Section 1981 is insufficient.

With respect to Covenant Section 502(a)(2), there was no claim that Congress enacted this provision with the intent to bring the Trust Territory government, by virtue of its location within the Commonwealth of the Northern Marianas, generally within the scope of United States law. As the legislative history of the Covenant makes clear, the Section's purpose was to "provide a workable body of law when the new government of the Northern Mariana Islands becomes operative," S. Rep. No. 433, 94th Cong., 1st Sess. 76 (1975), not to modify the presumption that federal law ordinarily does not apply to the Trust Territory or its government. Indeed, elsewhere in the Covenant, where Congress intended to refer to the Trust Territory government, it did so explicitly. See Covenant § 801, 90 Stat. 273 (providing for disposition of real and personal property of "the Government of the Trust Territory of the Pacific Islands" upon termination of Trusteeship Agreement). Finally, it is not surprising that Congress manifested no intent to alter the presumption that federal law does not apply to the Trust Territory when it approved the Covenant; subjecting the Trust Territory government to United States law within the Northern Marianas but not elsewhere could have led to the imposition of varying and possibly inconsistent responsibilities on the Trust Territory government.¹⁴

¹⁴ Petitioners' reliance on "the general rule" that "any person within the jurisdiction is always amenable to the law of that jurisdiction" is misplaced. Pet. 16 (citing *Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549 (1922)). Given the unique, sovereign status of the Trust Territory government, it may not, even in its waning days, be treated as if it were simply another individual within the jurisdiction of the Commonwealth of the Northern Marianas.

b. Sovereign immunity considerations also support the result reached by the court of appeals.¹⁵ It has long been established that territorial governments are entitled to sovereign immunity. *Porto Rico v. Rosaly*, 227 U.S. 270, 273 (1913); *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). The consistent line of appellate decisions recognizing the unique "quasi-sovereign" status of the Trust Territory establishes that the claim of the Trust Territory government to sovereign immunity is, if anything, superior to that of an ordinary territorial government. Because sovereign immunity principles generally forbid suit for money damages against a sovereign entity, see, e.g., *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945), petitioners' Section 1981 claim against the Trust Territory government for money damages must fail.¹⁶

The fact that the Trust Territory government was sued in a federal court does not lessen its immunity. Cf. *Verlinden B.V. v. Central Bank of Nigeria*, 461

¹⁵ The sovereign immunity issues in this case are similar to those discussed in more detail in our *amicus* brief (at 22-28) in *Ngiraingas v. Sanchez*, 110 S.Ct. 1737 (1990). Copies of that brief have been furnished to the parties.

¹⁶ Sections 251-253 of Chapter 6 of the Trust Territory Code (Michie 1980), modeled after the Tucker Act, 28 U.S.C. 1491, and the Federal Tort Claims Act, 28 U.S.C. 1346 and 2674, waive the Territory's sovereign immunity for certain purposes. See *Ikosia v. Trust Territory of the Pacific Islands*, 7 T.T.R. 274, 277 (High Court Trial Div. 1975). With respect to tort claims, the provisions waive sovereign immunity only for negligence claims, 6 T.T.C. § 251(c), and in addition exclude claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." 6 T.T.C. § 252(2). Contrary to petitioners' contention (Pet. 27), therefore, they do not waive the Territory's sovereign immunity for purposes of any of the claims in this case.

U.S. 480, 486 (1983) (foreign nations historically had "complete immunity from suit" in U.S. courts, prior to enactment of statute specifically restricting such immunity); *Nevada v. Hall*, 440 U.S. 410, 416 (1979) (foreign sovereigns have immunity as a "matter of comity," absent specific restriction of such immunity); *Hans v. Louisiana*, 134 U.S. 1 (1890) (State has immunity in federal court unless consent is given). Nor is immunity overcome by the fact that petitioners sued the Trust Territory government under federal law. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *Berizzi Bros. v. S.S. Pesaro*, 271 U.S. 562 (1926). Absent waiver or congressional abrogation of the Trust Territory government's immunity, petitioners' Section 1981 claim for money damages must fail.¹⁷

4. The court of appeals was also correct in holding that the Trusteeship Agreement and the Trust Territory Code do not create private rights of action for money damages against the Trust Territory government, and that holding is not in conflict with the decision of any other court.

a. As petitioners concede (Pet. 25-26), a treaty creates judicially enforceable rights "if the signing parties so desire," *Cardenas v. Smith*, 733 F.2d 909, 918 (D.C. Cir. 1984), and the meaning of a treaty "is to be ascertained by the same rules of construction and reasoning which apply to the interpretation of private contracts." *United States v. Kember*, 685

¹⁷ Moreover, as Judge Kozinski noted in his concurring opinion below, the suit may be regarded as one against the United States to the extent that any money judgment would expend itself on the public treasury (Pet. App. 23-25). The United States, of course, has not consented to any action against it.

F.2d 451, 458 (D.C. Cir.), cert. denied, 459 U.S. 832 (1982).

There is no provision in the Trusteeship Agreement authorizing damages for a violation of its terms. Indeed, it would be odd to find such a provision, since treaties ordinarily do not give rise to private causes of action, and sovereign immunity would ordinarily shield the government from such liability. Cf. 28 U.S.C. 1502 (Claims Court has no jurisdiction over claim arising out of any treaty). See *Nitol v. United States*, 7 Cl. Ct. 405, 416-417 (1985) (Trusteeship Agreement is a treaty for purposes of 28 U.S.C. 1502); *Peter v. United States*, 6 Cl. Ct. 768, 778-779 (1984) (same). Moreover, a private damages remedy would be inconsistent with the United States' concern, evident in several Trusteeship Agreement provisions, for retaining full freedom of action to protect its strategic interests in the Territory. See Trusteeship Agreement, art. 3, 61 Stat. 3302 (granting the United States "full powers of administration, legislation and jurisdiction"); art. 5, 61 Stat. 3302 (permitting United States to establish military bases and station armed forces in the Trust Territory); art. 13, 61 Stat. 3304 (permitting United States to close "any areas" of the Trust Territory from time to time "for security reasons").

The legislative history shows that when Congress approved the Trusteeship Agreement, it believed that the Agreement would not be enforceable outside the forum of international opinion.¹⁸ When asked at a

¹⁸ In a case seeking an injunction against approval by the Trust Territory High Commissioner of a lease to construct a hotel on Saipan prior to completion of an environmental evaluation, the Ninth Circuit has held that the Trusteeship Agreement created enforceable rights against the Trust Territory

hearing whether the United Nations could “[o]verrule our authority, or say that we are doing something that we should not, or say we had to do it in some other way,” the State Department’s witness replied that the authority of the United States “could not in any degree be overruled in any circumstance, but it might be noted that if we did not spend enough for health conditions or education or in other ways, we might be subject to some criticism.” *Trusteeship Agreement for the Territory of the Pacific Islands: Hearing Before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 22 (1947) (statement of Benjamin Gerig). See *Pauling v. McElroy*, 164 F. Supp. 390, 393 (D.D.C. 1958) (holding that the Trusteeship Agreement, like the U.N. Charter and the principle of freedom of the seas, was “not self-executing and do[es] not vest any of the plaintiffs with individual legal rights which they may assert in this Court”), aff’d on other grounds, 278 F.2d 252 (D.C. Cir), cert. denied, 364 U.S. 835 (1960).

b. The court of appeals was correct in holding (Pet. App. 17) that the anti-discrimination provision of the Trust Territory Code, 1 T.T.C. § 7,¹⁹ does not

government. *People of Saipan v. United States Dep’t of Interior*, 502 F.2d 90 (1974), cert. denied, 420 U.S. 1003 (1975). Even if correct, the holding in *People of Saipan* that the Trusteeship Agreement creates rights enforceable by injunction would not establish that it creates a cause of action against the Trust Territory government for money damages. Cf. *Quern v. Jordan*, 440 U.S. 332 (1979). Thus, the decision below did not “[e]ffectively overrule[]” *People of Saipan* (Pet. 16). In any event, an intracircuit inconsistency would not be a matter for this Court’s review.

¹⁹ 1 Trust Territory Code § 7 provides that “[n]o law shall be enacted in the Trust Territory which discriminates against any person on account of race, sex, language or religion; nor

create a private right of action for money damages against the Trust Territory government.²⁰ In general, "a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed'." *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). In the absence of anything resembling a clear statement that the Trust Territory government would be liable for money damages under Trust Territory Code § 7, petitioners' claim for damages is precluded.²¹

c. In sum, petitioners fail to recognize that the question whether the Trusteeship Agreement or the Trust Territory Code may be enforced by an injunction is distinct from the question whether the Agreement or the Code provides for monetary damages.

shall the equal protection of the laws be denied." See Pet. App. 148 n.137.

²⁰ It is not clear that the petition raises the issue of the availability of damages against the Trust Territory government pursuant to 1 Trust Territory Code § 7. The second question presented is ambiguous and, although the portion of the petition entitled "Argument" does discuss provisions of the Trust Territory Code waiving sovereign immunity, see Pet. 27 (discussed in note 16, *supra*), there is no discussion of Section 7 in that portion of the petition.

²¹ As the court of appeals recognized (see Pet. App. 16 n.8), even if the case involved a suit by a private party against an entity not entitled to sovereign immunity, the absence of any indication of intent in the Trusteeship Agreement or Trust Territory Code to permit private suits for money damages would preclude implication of such a private right of action. Cf. *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). Petitioners cite no authority suggesting that any Trust Territory decision has ever awarded damages for violation of 1 Trust Territory Code § 7.

The Court has rejected as "unsound" the argument that "all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation," *United States v. Testan*, 424 U.S. 392, 401 (1976). Petitioners' argument is unsound for the same reason: the intent to carry out the Trusteeship Agreement's obligations does not automatically translate into authority to provide "financial recourse" for breach of those obligations. Pet. App. 16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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